

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

ANRAY SERVICE, INC.

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period June 1, 1979
through May 31, 1981.

In the Matter of the Petition

of

ANTHONY ROBERTO,
AS OFFICER OF ANRAY SERVICE, INC.

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period June 1, 1979
through May 31, 1981.

DETERMINATION

In the Matter of the Petition

of

ANRAY SERVICE, INC.

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Fiscal Years
Ending March 31, 1980 and March 31, 1981.

In the Matter of the Petition

of

MID-CENTER SERVICE CENTER, INC.

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period June 1, 1979
through August 31, 1981.

In the Matter of the Petition	:
of	:
ANTHONY ROBERTO, AS OFFICER OF MID-CENTER SERVICE CENTER, INC.	:
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1979 through August 31, 1981.	:
In the Matter of the Petition	:
of	:
MID-CENTER SERVICE CENTER, INC.	:
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ending July 31, 1980 and July 31, 1981.	:
	DETERMINATION
In the Matter of the Petition	:
of	:
PHYLLIS SERVICE CENTER, INC.	:
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1979 through August 31, 1981.	:
In the Matter of the Petition	:
of	:
ANTHONY ROBERTO, AS OFFICER OF PHYLLIS SERVICE CENTER, INC.	:
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1979 through August 31, 1981.	:

In the Matter of the Petition
of
PHYLLIS SERVICE CENTER, INC.
for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Fiscal Years
Ending June 30, 1980 and June 30, 1981.

In the Matter of the Petition
of
GASLITE SERVICE CENTER, INC.
for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period June 1, 1979
through May 31, 1981.

DETERMINATION

In the Matter of the Petition
of
ANTHONY ROBERTO,
AS OFFICER OF GASLITE SERVICE CENTER, INC.
for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period June 1, 1979
through May 31, 1981.

In the Matter of the Petition
of
ANTHONY ROBERTO AND ROSE ROBERTO
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1980 and 1981.

Petitioners Anray Service, Inc. and Anthony Roberto, as officer, 19 Lodi Street, Islip Terrace, New York 11752, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through May 31, 1981 (File Nos. 800851 and 800852).

Petitioner Anray Service, Inc., 19 Lodi Street, Islip Terrace, New York 11752, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ending March 31, 1980 and March 31, 1981 (File No. 801230).

Petitioners Mid-Center Service Center, Inc. and Anthony Roberto, as officer, 19 Lodi Street, Islip Terrace, New York 11752, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through August 31, 1981 (File Nos. 800848 and 800855).

Petitioner Mid-Center Service Center, Inc., 19 Lodi Street, Islip Terrace, New York 11752, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ending July 31, 1980 and July 31, 1981 (File No. 801232).

Petitioners Phyllis Service Center, Inc. and Anthony Roberto, as officer, 19 Lodi Street, Islip Terrace, New York 11752, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through August 31, 1981 (File Nos. 800850 and 800853).

Petitioner Phyllis Service Center, Inc., 19 Lodi Street, Islip Terrace, New York 11752, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ending June 30, 1980 and June 30, 1981 (File No. 801231).

Petitioners Gaslite Service Center, Inc. and Anthony Roberto, as officer, 19 Lodi Street, Islip Terrace, New York 11752, filed petitions for revision of determinations or for refunds of

sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through May 31, 1981 (File Nos. 800849 and 800854).

Petitioners Anthony Roberto and Rose Roberto, 19 Lodi Street, Islip Terrace, New York 11752, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1980 and 1981 (File No. 801264).

A consolidated hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 30, 1987 at 10:30 A.M., with all briefs to be submitted by April 15, 1987. Petitioners appeared by Patrick A. Troise, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the sales tax assessments and the deficiencies in corporation franchise tax and personal income tax were proper, where the determinations were based on purchases reported by a gasoline supplier, estimated repairs and an indirect audit of personal income.

II. Whether consents extending the period of limitation for assessment of tax were validly executed.

III. Whether petitioner Anthony Roberto was a person required to collect tax on behalf of the corporate petitioners.

IV. Whether petitioner Rose Roberto was an "innocent spouse" with respect to the deficiency in personal income tax.

FINDINGS OF FACT

1. A multi-audit of petitioners, Anray Service, Inc., Mid-Center Service Center, Inc., Phyllis Service Center, Inc., Gaslite Service Center, Inc. and Anthony and Rose Roberto, was conducted by the Suffolk District Office. The taxes and periods involved were as follows:

<u>Petitioner</u>	<u>Tax</u>	<u>Period</u>
Anray Service, Inc.	Sales & Use	6/1/79-5/31/81
Anray Service, Inc.	Corporation Franchise	FYE 3/31/80, 3/31/81
Mid-Center Service Center, Inc.	Sales & Use	6/1/79-8/31/81
Mid-Center Service Center, Inc.	Corporation Franchise	FYE 7/31/80, 7/31/81
Phyllis Service Center, Inc.	Sales & Use	6/1/79-8/31/81
Phyllis Service Center, Inc.	Corporation Franchise	FYE 6/30/80, 6/30/81
Gaslite Service Center, Inc.	Sales & Use	6/1/79-5/31/81
Anthony & Rose Roberto	Personal Income	1980, 1981

Anray Service, Inc.

2. Petitioner Anray Service, Inc. ("Anray") operated a Shell gasoline station at One Jericho Plaza, Jericho, New York. The station had six pumps with ten hoses and also had two service bays.

(a) Sales Tax.

Records available for audit were ledgers, cash book, journals, trial balances, bank statements and checks. Anray's gasoline purchases, as per books, could not be reconciled with its gasoline purchases as reported by Shell Oil Company. Accordingly, a markup audit was performed:

(i) 4/1/79-3/31/80:

Gasoline	\$1,179,309 + 20% markup	\$1,415,170
Oil	587 + 50% markup	704 ¹
Repairs	one week parts 1,052	
	one week labor <u>508</u>	
	1,560 x 52 weeks	81,120
Inspections	10 per week @ \$12.50 x 52 weeks	<u>6,500</u>
Total audited sales		\$1,503,494
Less: inspections (nontaxable)		<u>(6,500)</u>
Total audited taxable sales		\$1,496,994
Less: taxable sales reported		<u>(1,207,333)</u>
Additional taxable sales		\$ 289,661

¹The auditor made a calculation error in that a markup of 50 percent on \$587.00 does not yield \$704.00, but \$880.50. The difference, however, has a negligible effect on the overall audit results.

(ii) 4/1/80-3/31/81:

Gasoline	\$1,739,009 + 20% markup	\$2,086,811
Oil	16,824 + 50% markup	25,236
Repairs	one week parts 1,052	
	one week labor <u>508</u>	
	1,560 x 52 weeks	81,120
Inspections	10 per week @ \$12.50 x 52 weeks	<u>6,500</u>
Total audited sales		\$2,199,667
Less: inspections (nontaxable)		<u>(6,500)</u>
Total audited taxable sales		\$2,193,167
Less: taxable sales reported		<u>(1,703,282)</u>
Additional taxable sales		\$ 489,885

(iii) The gross markup per Federal returns for the two years, excluding inspections, averaged 12.63 percent (\$357,213.00 gross profit minus \$13,000.00 inspections divided by \$2,726,201.00 cost of goods sold).

(iv) It is unclear from the record how the additional taxable sales for the periods April 1, 1979 through March 31, 1980 and April 1, 1980 through March 31, 1981 were transposed to the audit period June 1, 1979 through May 31, 1981. The auditor, nevertheless, found \$3,416,702.00 in taxable sales for the audit period resulting in \$239,169.14 in tax. As \$187,980.95 in tax had been paid, additional tax due was calculated at \$51,188.19.

(v) A consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through November 30, 1979 to March 31, 1983 was executed on behalf of Anray on August 3, 1982 by Marie Verdi, as secretary. A second consent extending the period of limitation for the period June 1, 1979 through May 31, 1980 to October 31, 1983 was executed on December 20, 1982 by Raymond Verdi, as president.

(vi) On September 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Anray for the period June 1, 1979 through May 31, 1981 in the amount of \$51,188.19 in tax, \$12,797.05 in penalty and \$17,819.64 in interest, for a total due of \$81,804.88. On the same date, a similar notice was issued to petitioner Anthony Roberto, as officer of Anray.

(b) Corporation Franchise Tax.

(i) The auditor performed a standard corporate income-type audit which did not result in any changes. However, in view of the additional sales found in the sales tax audit, the auditor adjusted Anray's income by adding additional sales, less additional purchases:

	<u>FYE 3/31/80</u>	<u>FYE 3/31/81</u>
Additional sales	\$336,751.00	\$282,996.00
Less: additional purchases	<u>(171,618.00)</u>	<u>(22,250.00)</u>
Net adjustment	\$165,133.00	\$260,746.00
Additional tax due	\$ 16,070.60	\$ 25,347.10

(ii) On April 4, 1983, a consent extending the period of limitation for assessment of tax for the fiscal year ending March 31, 1980 to June 15, 1984 was executed on behalf of Anray by Raymond Verdi, as president.

(iii) On October 12, 1983, the Audit Division issued a Statement of Franchise Tax Audit Changes to Anray for \$16,070.60 in additional tax for the fiscal year ending March 31, 1980 and \$25,347.10 in additional tax for the fiscal year ending March 31, 1981.

(iv) On March 16, 1984, notices of deficiency were issued to Anray as follows:

<u>FYE</u>	<u>Tax</u>	<u>Interest</u>	<u>Additional Charge</u>	<u>Total Due</u>
3/31/80	\$16,070.60	\$ 8,302.28	\$ 803.53	\$25,176.41
3/31/81	25,347.10	10,797.29	1,267.35	37,411.74

Mid-Center Service Center, Inc.

3. Mid-Center Service Center, Inc. ("Mid-Center") operated a Shell gasoline station at 1537 Middle Country Road, Centereach, New York. The station was self-service and had six pumps with twelve hoses. There were no service bays.

(a) Sales Tax. The auditor examined Mid-Center's records, which included ledgers, cash books, journals, trial balances, bank statements and checks. Gasoline purchases per books did not reconcile with gasoline purchases reported by Mid-Center's supplier, Shell Oil Company. Accordingly, a sales tax markup audit was performed:

(i) FYE 7/31/80. Gasoline purchases per books were \$2,413,802.00 while purchases reported by Shell were \$2,487,793.00, resulting in additional unreported purchases of \$73,991.00. On May 9, 1983, the auditor visited the station and found pump prices of \$1.209 per gallon for regular, \$1.279 for unleaded and \$1.459 for super unleaded. These prices were compared with costs for gas purchased on May 10, 1983 and it was found that \$10,793.00 in purchases would be sold at \$11,293.00 at the pump, resulting in an overall markup of 4.63 percent. Despite the calculated markup, the auditor used a markup of 10 percent. Accordingly, gasoline purchases as per Shell of \$2,487,793.00 were, after the 10 percent markup, \$2,736,572.00. As the station had no repairs, this figure was used as total audited sales. Additional sales for this period were \$215,639.00.

(ii) FYE 7/31/81. Gasoline purchases per books were \$2,613,086.00 while purchases reported by Shell were \$2,701,503.00, resulting in additional purchases of \$88,417.00. The 10 percent markup was again used. Accordingly, gasoline purchases as per Shell of \$2,701,503.00, after the 10 percent markup, were \$2,971,653.00 and additional sales were found to be \$879,388.00.

(iii) Markup as per the Federal income tax returns for the two year period was 4.70 percent (\$236,033.00 gross profit divided by \$5,021,129.00 in cost of goods sold).

(iv) The additional sales for the fiscal years ending July 31, 1980 and July 31, 1981, totalling \$1,095,028.00, were spread over the sales tax audit period (there was one month difference) resulting in \$76,651.75 in additional tax.

(v) On August 3, 1982, a consent extending the period of limitation for assessment for the period June 1, 1979 through November 30, 1979 to March 31, 1983 was executed by Anthony Roberto, as president, on behalf of Mid-Center. A similar consent extending the period of limitation for assessment for the period June 1, 1979 through May 31, 1980 to October 31, 1983 was signed by Anthony Roberto, as president, on December 20, 1982.

(vi) On September 20, 1983, the Audit Division issued a Notice of Determination

and Demand for Payment of Sales and Use Taxes Due to Mid-Center for the period June 1, 1979 through August 31, 1981 for \$76,651.75 in tax, \$19,162.94 in penalty and \$23,767.23 in interest, for a total of \$119,581.92. On the same date, a similar notice was issued to petitioner Anthony Roberto, as officer of Mid-Center.

(b) Corporation Franchise Tax.

(i) The auditor noted that a corporate income-type audit did not produce any changes. In view of the additional sales found in the sales tax audit, the auditor adjusted Mid-Center's income by adding additional sales less additional purchases:

	<u>FYE 7/31/80</u>	<u>FYE 7/31/81</u>
Additional sales	\$209,273.00	\$241,790.00
Less: additional purchases	<u>(73,991.00)</u>	<u>(88,417.00)</u>
Net adjustment	\$135,282.00	\$153,373.00
Additional tax due	\$ 12,859.30	\$ 14,963.20

(ii) On June 7, 1983, a consent extending the period of limitation for assessment for the fiscal year ending July 31, 1980 to October 15, 1984 was executed by Anthony Roberto, as president of Mid-Center.

(iii) A Statement of Franchise Tax Audit Changes was issued to Mid-Center on October 12, 1983 for \$12,859.30 in additional tax due for the fiscal year ending July 31, 1980 and \$14,963.20 for the fiscal year ending July 31, 1981.

(iv) On March 16, 1984, the Audit Division issued notices of deficiency to Mid-Center as follows:

<u>FYE</u>	<u>Tax</u>	<u>Interest</u>	<u>Additional Charge</u>	<u>Total Due</u>
7/31/80	\$12,859.30	\$6,253.68	\$642.97	\$19,755.95
7/31/81	14,963.20	5,682.71	798.16	21,394.07

Phyllis Service Center, Inc.

4. Petitioner Phyllis Service Center, Inc. ("Phyllis") operated a Shell gasoline station at 197 Sunrise Highway, Patchogue, New York. It was a "gas only" station, with six pumps and

twelve hoses. Three of the pumps were self-service and three were full-service.

(a) Sales Tax.

The auditor examined ledgers, cash books, journals, trial balances, bank statements and checks. Gasoline purchases per books did not reconcile with gas purchases reported by Phyllis' supplier, Shell Oil Company. Accordingly, a sales tax markup audit was performed:

(i) FYE 6/30/80. Purchases of gasoline and oil per books were \$992,966.00 while purchases reported by Shell were \$1,052,355.00, resulting in additional unreported purchases of \$59,389.00. Gasoline purchases as per Shell of \$1,044,840.00 were marked up 10 percent resulting in gasoline sales of \$1,149,324.00, while oil purchases as per Shell of \$7,515.00 were marked up 50 percent, resulting in oil sales of \$11,273.00. The station did not perform repairs, so total audited sales were \$1,160,597.00.

(ii) FYE 6/30/81. Purchases of gasoline and oil per books were \$1,060,710.00 while purchases as per Shell were \$1,098,500.00, a difference of \$37,790.00. Gasoline purchases as per Shell of \$1,077,394.00 were marked up 10 percent resulting in gasoline sales of \$1,185,133.00 and oil purchases as per Shell of \$21,106.00 were marked up 50 percent, resulting in oil sales of \$31,659.00. Total audited sales were \$1,216,792.00.

(iii) The markup as per the Federal income tax returns for the two years averaged 5.76 percent (\$118,214.00 gross profit divided by \$2,050,909.00 cost of goods sold).

(iv) The additional sales for fiscal years ending June 30, 1980 and June 30, 1981, totalling \$360,075.00, were spread over the sales tax audit period resulting in \$25,205.22 in additional tax.

(v) On August 3, 1982, a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through November 30, 1979 to March 31, 1983 was executed on behalf of Phyllis by Anthony Roberto, as president. On December 20, 1982, a consent extending the period of limitation for sales and use taxes for the period June 1, 1979 through May 31, 1980 to October 31, 1983 was executed on behalf of Phyllis by Anthony

Roberto, as president.

(vi) On September 20, 1983, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against Phyllis for the period June 1, 1979 through August 31, 1981 in the amount of \$25,205.22 in tax and \$8,532.81 in interest, for a total due of \$33,738.03. On the same date, a similar notice was issued to Anthony Roberto, as officer of Phyllis.

(b) Corporation Franchise Tax.

(i) The auditor noted that a corporate income-type audit did not produce any changes. In view of the additional sales found in the sales tax audit, the auditor adjusted Phyllis's income by adding additional sales less additional purchases:

	<u>FYE 6/30/80</u>	<u>FYE 6/30/81</u>
Additional sales	\$124,829.00	\$86,497.00
Less: additional purchases	<u>(59,389.00)</u>	<u>(37,790.00)</u>
Net adjustment	\$ 65,440.00	\$48,707.00
Additional tax due	\$ 6,386.40	\$ 4,716.00

(ii) On June 7, 1983, a consent extending the period of limitation for assessment of corporation franchise tax for the fiscal year ending June 30, 1980 to September 15, 1984 was executed on behalf of Phyllis by Anthony Roberto, as president.

(iii) On October 12, 1983, a Statement of Franchise Tax Audit Changes was issued to Phyllis for tax due of \$6,386.40 and penalty of \$319.32 for the fiscal year ending June 30, 1980 and \$4,716.00 in tax and \$235.80 in penalty for the fiscal year ending June 30, 1981.

(iv) On March 16, 1984, the Audit Division issued notices of deficiency to Phyllis as follows:

<u>FYE</u>	<u>Tax</u>	<u>Interest</u>	<u>Additional Charge</u>	<u>Total Due</u>
6/30/80	\$6,386.40	\$3,153.40	\$319.32	\$9,859.12
6/30/81	4,716.00	1,861.29	235.80	6,813.09

Gaslite Service Center, Inc.

5. Gaslite Service Center, Inc. ("Gaslite") operated a Shell service station at 375 Deer Park Avenue, Babylon, New York during the period at issue. It had four pumps (two double, two single) and two service bays. It also provided railroad commuter parking. The station had been closed and was boarded up prior to the audit. The only assessment at issue is with respect to sales tax and the audit was conducted as follows:

(a) The auditor examined ledgers, cash books, journals, trial balances, bank statements and checks. Gasoline purchases as per the books did not reconcile with gasoline purchases reported by Gaslite's supplier, Shell Oil Company. Accordingly, the markup method of audit was used.

(b) FYE 3/31/80. Purchases per books were \$466,039.00 while purchases reported by Shell were \$500,770.00, resulting in additional unreported gasoline purchases of \$34,731.00. All purchases except \$3,732.00 of Shellzone were of gasoline. The purchases were marked up 20 percent resulting in sales of Shell products of \$600,924.00. Repair sales were estimated at \$1,000.00 per week for each of the two bays, or \$104,000.00. Railroad parking was calculated at 40 cars at \$20.00 per month, or \$9,600.00 per year. Total audited sales were \$714,524.00. Total audited sales less parking (\$9,600.00), less reported sales (\$537,556.00), resulted in \$167,368.00 in additional taxable sales.

(c) FYE 3/31/81. Purchases per books were \$579,192.00 while purchases as per Shell were \$570,272.00, or \$8,920.00 less than purchases per books. The purchases per Shell of \$570,272.00, all gasoline, were marked up 20 percent resulting in gasoline sales of \$684,326.00. Repairs were again estimated at \$1,000.00 per week per bay, or \$104,000.00. Railroad parking again was estimated at 40 cars at \$20.00 per month, or \$9,600.00. Total audited sales were \$797,926.00. Total audited sales less parking (\$9,600.00) less reported sales (\$552,776.00) resulted in \$235,550.00 in additional taxable sales.

(d) The markup as per the Federal returns for the two years averaged 13.15 percent after

allowance for nontaxable parking of \$9,600.00 per year.

(e) The \$167,368.00 in additional taxable sales for the fiscal year ending March 31, 1980 and \$235,550.00 for the fiscal year ending March 31, 1981 totalled \$402,918.00 for the two fiscal years. As the sales tax quarters differed from Gaslite's fiscal year, \$375,021.00 of said total was applied as additional sales for the sales tax period June 1, 1979 through May 31, 1981.

(f) On August 6, 1982, a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through November 30, 1979 to March 31, 1983 was executed on behalf of Gaslite by Marie Verdi, as secretary. On December 20, 1982, another such consent extending the period of limitation for assessment for the period June 1, 1979 through May 31, 1980 to October 31, 1983 was executed on behalf of Gaslite by Raymond Verdi, as president.

(g) On September 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Gaslite for the period June 1, 1979 through May 31, 1981 for \$26,253.92 in tax, \$6,563.48 in penalty and \$9,224.71 in interest, for a total amount due of \$42,042.11. On the same date, a similar notice was issued to Anthony Roberto, as officer of Gaslite.

Anthony Roberto and Rose Roberto

6. (a) A detailed income tax audit of petitioners Anthony Roberto and Rose Roberto was performed by the cash availability method of income reconstruction. Records examined included corporate records, Federal tax returns, bank statements, cancelled checks, savings accounts and other financially-related data. The cash availability study resulted in a \$6,809.00 shortage for 1980, but this amount was not utilized in calculating a deficiency. The deficiency was based on additional shares of undistributed taxable income from Anray and Gaslite:

	<u>FYE</u>	<u>1980</u>	<u>1981</u>
Anray	3/31/80	\$ 82,566.50	\$130,373.00
Gaslite	3/31/80	<u>69,544.50</u>	<u>68,033.00</u>
		\$158,920.00	\$198,406.00

(b) On January 10, 1984, the Audit Division issued a revised Statement of Audit Changes to petitioners Anthony and Rose Roberto asserting additional tax due of \$20,747.55 and \$1,037.38 as a penalty under Tax Law § 685(b), on a joint basis for 1980, and \$26,760.24 in tax and \$1,338.01 as a penalty for 1981.

(c) On March 26, 1984, the Audit Division issued two notices of deficiency to Mr. and Mrs. Roberto: one in the amount of \$20,747.55 in tax and \$1,037.38 in penalty, plus interest, for 1980; the other in the amount of \$26,760.24 in tax and \$1,338.01 in penalty, plus interest, for 1981.

Anthony Roberto's Involvement in the Businesses

7. Petitioner Anthony Roberto was employed by the United States Post Office Department when he was asked by his brother-in-law, Raymond Verdi, to join him in a service station business venture. At the time, Mr. Verdi was involved with Shell Oil Company in some capacity.

8. In February 1972, petitioner Anthony Roberto joined Raymond Verdi in forming Anray and operating the Anray station. Mr. Roberto worked basically as a mechanic.

9. Petitioner Anthony Roberto and Raymond Verdi eventually acquired interests in eight corporations operating eight separate gasoline stations, including Anray, Mid-Center, Phyllis and Gaslite.

10. The stations were owned by Shell Oil Company and leased to petitioner Anthony Roberto and Raymond Verdi. Mr. Roberto made no financial investment when the stations were acquired, but Mr. Verdi advanced monies for security on the leases.

11. Petitioner Anthony Roberto was a field man for the eight stations. He would get up at about 5:00 A.M. each day and check out all of the stations. He would perform repairs, fix pumps and hoses and fill in if an employee did not show up. He would empty the stations' safes of cash and bring the cash back to the office. Raymond Verdi would deposit the cash in a bank.

12. Petitioner Anthony Roberto had authority to sign checks on behalf of the corporations;

however, he rarely used this authority, since checks, as a rule, were signed by Raymond Verdi.

13. Raymond Verdi generally signed all purchase orders and tax returns and dealt with the banks.

14. Effective September 1, 1981, petitioner Anthony Roberto and Raymond Verdi decided to part company and the eight service stations were divided between the two individuals. Of the four corporations at issue here, the stock of Anray and Gaslite was acquired by Raymond Verdi and the stock of Mid-Center and Phyllis was acquired by Anthony Roberto. On said date, Mr. Roberto resigned as officer and director of Anray and Gaslite.

15. Raymond Verdi withdrew the sum of \$22,000.00 from Woodlake Service Center, Inc., one of the service stations owned by petitioner Anthony Roberto and Raymond Verdi, on April 15, 1980 without Mr. Roberto's approval.

16. A judgment of \$65,000.00 was rendered against petitioner Anthony Roberto due to a loan guarantee which was executed on July 10, 1981 with respect to a loan made to Anray on November 3, 1982, more than a year after petitioner severed connections with Anray. The loan was made without Mr. Roberto's knowledge and he had been misled by Mr. Verdi into not cancelling the guarantee.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous. (Surface Line Operators Fraternal Organization, Inc. v.

Tully, 85 AD2d 858.)

C. That, in this case, the corporate petitioners' records were incomplete and insufficient, as gasoline purchase records could not be reconciled to gasoline purchases as reported by Shell Oil Company. Accordingly, it was proper for the Audit Division to perform an audit based on the markup of purchases.

D. That although a markup audit was permissible, the gasoline markup percentages used by the Audit Division were incorrect. The only markup comparison performed was a one-shipment test of Mid-Center which resulted in a 4.63 percent markup, which was very close to the 4.70 percent average markup as per Mid-Center's Federal income tax returns. The Audit Division did not show how it calculated the 10 percent markup applied to Mid-Center and Phyllis or the 20 percent markup applied to Anray and Gaslite. Accordingly, the markups are reduced to the average markup per the Federal income tax returns for each corporation, i.e.:

Anray	12.63%
Mid-Center	4.70%
Phyllis	5.76%
Gaslite	13.15%

The sales tax assessments against said corporations are to be recomputed applying said markups to gasoline purchases as per the Shell reports. The portions of the assessments based on oil sales and repair sales are to remain the same.

E. That Tax Law § 1133(a) provides, in pertinent part, as follows:

"Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article."

F. That during the period at issue, Tax Law § 1131(1) provided as follows:

"'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

G. That petitioner Anthony Roberto was a 50 percent shareholder and an officer and director of Anray, Mid-Center, Phyllis and Gaslite and was signatory on the corporate bank accounts during the periods in issue. While Raymond Verdi may have assumed more control over the financial affairs of the corporations than Anthony Roberto, nevertheless, Mr. Roberto was a person required to collect tax on behalf of said corporations and, as such, could not abrogate his responsibility to see to it that all taxes were properly collected and remitted.

H. That no assessment of sales tax may be made against petitioner Anthony Roberto for sales tax due from Anray and Gaslite for periods ending prior to June 1, 1980. The consents extending the period of limitation on assessment with respect to said corporations were executed by the corporations after Mr. Roberto had severed his relationship with them and, thus, he is not bound thereby (Matter of Ronald Rossi, State Tax Commn., September 16, 1983).

I. That the deficiencies in corporate franchise tax issued against Anray, Mid-Center and Phyllis are to be modified by reducing the additional sales used in the calculation of each deficiency as per Conclusion of Law "D".

J. That where controlling stockholders divert corporate income to themselves, such diverted funds should be treated as constructive dividends (Ball v. Commissioner, 44 TCM 863). However, there is no evidence in the record to show that petitioners Anthony and Rose Roberto received any unreported income except for the \$6,809.00 shortage for 1980 determined by the cash availability study (Finding of Fact "6[a]"). In fact, the method of reconstruction of said petitioners' income examined their financial affairs in great detail and, except for said \$6,809.00, seems to confirm Mr. Roberto's contention that if any funds are missing, they were taken by Mr. Verdi. (It is noted that the \$22,000.00 bank withdrawal referred to in Finding of Fact "15" and the loan referred to in Finding of Fact "16" were offered by petitioner Anthony Roberto as examples of Mr. Verdi's conduct with respect to the financial affairs of the various corporations.)

K. That petitioner Rose Roberto has not shown that she is entitled to treatment as an "innocent spouse" under Tax Law § 651(b)(5). Even assuming that Mrs. Roberto was unaware

of the omitted \$6,809.00 in income (Conclusion of Law "J"), she failed to show that she did not benefit directly or indirectly from said income or that it would be inequitable to hold her liable for the deficiency attributable to such omission.²

L. That the petitions of Anray Service, Inc., Mid-Center Service Center, Inc., Phyllis Service Center, Inc. and Gaslite Service Center, Inc., with respect to sales and use tax, are granted to the extent provided by Conclusion of Law "D". The petitions of Anthony Roberto, as officer of Anray Service Center, Inc., Mid-Center Service Center, Inc., Phyllis Service Center, Inc. and Gaslite Service Center, Inc., are granted to the extent provided in Conclusions of Law "D" and "H". The petitions of Anray Service Center, Inc., Mid-Center Service Center, Inc. and Phyllis Service Center, Inc., with respect to corporation franchise tax, are denied. The petition of Anthony Roberto and Rose Roberto, with respect to personal income tax, is granted to the extent provided in Conclusion of Law "J". Except as hereby modified, the aforesaid notices of determination and demands for payment of sales and use taxes due, and the aforesaid notices of deficiency are sustained.

DATED: Albany, New York
December 23, 1987

ADMINISTRATIVE LAW JUDGE

²It is noted that the statutory criteria for treatment as an "innocent spouse" were somewhat modified by L. 1985, c. 65.